

SUMMARY ANALYSIS OF AMENDED BILL

Franchise Tax Board

Author: Lowenthal Analyst: Jeani Brent Bill Number: AB 1903

Related Bills: See Prior Analysis Telephone: 845-3410 Amended Date: 05/02/2000

Attorney: Patrick Kusiak Sponsor:

SUBJECT: Low-Income Housing Credits May Be Transferred, Sold, or Assigned Separately From Federal Credit

- ☒ DEPARTMENT AMENDMENTS ACCEPTED. Amendments reflect suggestions of previous analysis of bill as amended March 16, 2000.
- ☐ AMENDMENTS IMPACT REVENUE. A new revenue estimate is provided.
- ☒ AMENDMENTS DID NOT RESOLVE ALL OF THE DEPARTMENT'S CONCERNS stated in the previous analysis of bill as amended 03/16/2000.
- ☒ FURTHER AMENDMENTS NECESSARY.
- ☐ DEPARTMENT POSITION CHANGED TO _____.
- ☒ REMAINDER OF PREVIOUS ANALYSIS OF BILL AS AMENDED March 16, 2000, STILL APPLIES.
- ☐ OTHER - See comments below.

SUMMARY OF BILL

This bill would provide that the state low-income housing tax credit may be transferred, sold, or assigned separately from the federal low-income housing tax credit.

This analysis does not address the bill's changes to the Insurance Tax Law, as they do not impact the department's programs and operations or state income tax revenue.

SUMMARY OF AMENDMENT

The May 2, 2000, amendments accepted the technical amendments proposed in the department's analysis of the bill as amended March 16, 2000. Except for the technical considerations, the department's analysis of the bill as amended March 16, 2000, still applies. The department's policy and implementation considerations, as well as the revenue estimate, are included below for convenience.

Policy Considerations

Generally, tax credits are allowed only to the taxpayer that actually pays or incurs the related expense. Although the low-income housing credit statute specifically permits the credit to be transferred, the transfer is limited only to a purchaser of the property. The state credit may be transferred between affiliated corporations if the affiliation is 100% ownership, but this treatment merely gives the state low-income housing credit the same treatment as that provided under the federal consolidated return rules.

Board Position:

<input type="checkbox"/> S	<input type="checkbox"/> NA	<input type="checkbox"/> NP
<input type="checkbox"/> SA	<input type="checkbox"/> O	<input type="checkbox"/> NAR
<input type="checkbox"/> N	<input type="checkbox"/> OUA	<input checked="" type="checkbox"/> PENDING

Legislative Director

Date

Johnnie Lou Rosas

6/1/00

Conversely, this bill would create a state tax law precedent by allowing tax credits to be transferred from the taxpayer who incurred the expenses to **any** other taxpayer (irrespective of whether such transferee is an affiliate). Thus, this bill would allow tax credits to be realized by taxpayers that did not incur the actual out-of-pocket expense on which the tax credits are based, thereby providing a benefit to one taxpayer for the action of another taxpayer.

Further, this bill essentially would create a system of "tax benefit transfers" similar to the old federal safe harbor leasing regime. Tax benefits transferable under federal safe harbor leasing rules were limited to tax credits and related deductions for the purchase of certain property, and the transfer was accomplished by a nominal sale-leaseback of that property in which the rights of the parties to the various tax benefits were clearly defined. Moreover, under the old federal safe harbor leasing rules, the federal tax treatment of the various forms of consideration flowing between the parties to the transaction were clearly defined.

Unlike the old federal safe harbor leasing regime, however, the transfer, sale, or assignment of the credit under this bill would not be limited to credits related to the purchase of the low-income housing property; instead the credits could be transferred, sold, or assigned to anyone. Further, this bill is silent on the tax treatment of the various forms of consideration that may flow between the parties to the transfer, sale, or assignment transaction. Thus, absent further legislative clarification, it is unclear how the payments made by the acquiring taxpayer would be treated for California tax purposes by both the seller/transferor and the purchaser/transferee of these tax credits.

IMPLEMENTATION CONSIDERATIONS

Department staff has identified the following implementation considerations. These implementation considerations would make it very difficult to properly implement this bill. Additional concerns may be raised as the department continues to analyze the bill. Department staff is willing to assist the author with any necessary amendments to resolve these concerns.

1. This bill is silent with regard to the proper tax treatment by the transferor and the transferee of the amount paid for the transfer, sale, or assignment of the tax credits. It appears, because the bill does not state otherwise, that the transferor would include the amount received for the tax credit in income, and the transferee arguably could receive a business expense deduction for the purchase of the tax credit. In the absence of clarification, disputes may arise between taxpayers and the department about the proper tax treatment of the amount paid for the transfer, sale, or assignment of a tax credits under this bill.
2. This bill leaves unclear when the transferee taxpayer first could use the transferred tax credit and the amount that could be used. The federal rules, to which the state credit is conformed, allow allocation of the credit to the purchaser of the property. These rules specify that for the year of sale, the credit is allocated between the seller and purchaser based on the number of months each held the property. This bill does not specify whether these federal rules should apply to the proposed state transfer, allocation, and sale provisions. In the absence of direction, disputes may arise between taxpayers and the department about the timing of the use of transferred tax credits.

3. The bill does not address whether only the entire unused tax credit may be transferred or whether portions of the unused tax credit would be allowed to be transferred. If portions of the unused tax credit may be transferred, the bill does not address whether or how one tax credit may be divided among multiple transferees. Although the existing state law allowing assignment of any portion of the credit to affiliates does not specify precisely how the credit may be divided, that assignment is easier for the department to track since the assignment may be made only to affiliates with 100% ownership.
4. If audit results modify the low-income housing credit that has been transferred, assigned, or sold for consideration, it is unclear which taxpayer would be responsible for the additional tax from the audit adjustment. The bill should clarify how adjustments to the amount of the credit would be handled by the department after the credit is transferred, sold, or assigned. Moreover, since the department's audit of the transferor taxpayer's return may occur after normal expiration of the statute of limitations (i.e., under a waiver), it may be necessary for the department to request a waiver of the unaffiliated transferee taxpayer's statute of limitations. This would allow the department to adjust the transferee's tax liability if the department determines that part or all of the claimed tax benefit should be disallowed.

Alternatively, if the claimed tax credit of the transferor is disallowed only in part, it is unclear how this disallowance would be allocated between the transferor and the transferee, especially if the statute of limitations has expired for one, but not both, of the affected taxpayers.

Furthermore, if the author's intent is to allow a portion of the unused credit to be transferred, then it is unclear how a disallowance of a portion of the credit should be allocated between the taxpayers.

Tax Revenue Estimate

It is not possible to project in advance the response of taxpayers to this bill if enacted.

Revenue effects would include both cash-flow acceleration of tax credit usage and absolute revenue losses. The former would reflect more immediate use of tax credits by transferees, buyers, and assignees rather than later by transferors, sellers, and assignors. The latter would reflect the fact that some transferors, sellers, and assignors never would use all the potential tax benefits.

The following data was compiled from departmental records and information from the California Tax Allocation Committee.

- According to tax return data for 1997, approximately \$15 million in low-income housing credits were reported unused.
- Since many credits are allocated in advance of project completion and would most likely not be claimed for tax purposes until the second and third year after the credit is allocated by the Committee, it is difficult to determine the potential stock of unused credits.

- It is likely that some taxpayers with losses do not file the low-income housing credit form since they could not use the credit. Thus, it is likely that the stock of unused low-income housing credits is significantly larger than the above amount.

BOARD POSITION

Pending.